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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 22 2006

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time of filing, the petitioner was a visiting scientist at Washington University in St. Louis, Missouri, and indicated that he sought employment as a researcher and professor at that institution. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel describes the petitioner's work at Washington University:

> [The petitioner] is currently working on molecular and evolutionary genetics of *Helicobacter pylori*. This is the bacterial pathogen that . . . is a primary cause of **Peptic ulcer** disease, an early risk factor of **Gastric Cancer**, an important contributor to the risk of **Childhood diarrhea** and **Malnutrition** among the poor and many other disorders in human[s].
>
> [The petitioner's] research in Washington University in St. Louis, Missouri involves *Mechanism and control of drug resistance*, since [the] drug resistance rate in this bacteria is rising fast worldwide. [The petitioner] is also researching *Mutational analysis of genes important for colonizing, disease, and drug resistance*, using mice as an animal model.

(Counsel's emphasis.) The petitioner's initial submission includes several letters and certificates relating to the petitioner's professional credentials and positions he has held at various stages of his professional training and subsequent career. The petitioner also submits copies of his scholarly articles and abstracts of his conference presentations. This initial submission demonstrates that the petitioner has been very active in his field, but this by itself does not demonstrate eligibility for the waiver.

On May 4, 2005, the director issued a request for evidence (RFE), instructing the petitioner to submit documentation to meet the guidelines set forth in *Matter of New York State Dept. of Transportation.* In response, counsel states that the petitioner "is a highly educated gentleman with very high qualifications in his field which would make a great asset to any employer as well as the United States. [The petitioner] has made great contribution[s] to his field of microbiology and genetics and has helped in [the] development of new diagnostic techniques which have helped many people in the United States and around the world."

The petitioner offers his own statement, listing various qualifications such as his "[s]erving as [a] distinguished professor of teaching and research at the university level," having "[s]erved as the director and technical manager of a medical diagnostic laboratory" and "[s]upervising the thesis of more than 45 students at the M.Sc. and Ph.D. level." He concludes:

> My extensive experience in teaching and research in Microbiology and Immunology, management of different scientific organizations, having a comprehensive knowledge [regarding] my field of work, instead of being a monopole [*sic*] specialist, enables me to deeply investigate any emerging problem in Medical and Environmental Microbiology and command the development of a convenient technique to solve it.

The petitioner submits voluminous documentation in response to the RFE, much of which appears to be simply a resubmission of documents submitted previously, which the director had already deemed insufficient to establish the petitioner's eligibility for the waiver. We acknowledge that these materials establish the petitioner's extensive experience and high-ranking positions in his chosen field. Such factors could contribute to a finding that the beneficiary is an alien of exceptional ability in the sciences under section 203(b)(2) of the Act, but rank and length of experience are not *prima facie* factors in granting the national interest waiver. From the plain wording of the statute and regulations, it is clear that exceptional ability in the sciences does not automatically qualify an alien for the waiver; aliens of exceptional ability are, as a rule, subject to the job offer and labor certification requirements. The petitioner must identify specific factors that set him apart, rather than simply assert that his rank and experience have earned him the waiver. Similarly, descriptions of the petitioner's past work are of little value without some objective means (such as independent citation of the petitioner's published work) by which to show the significance of the petitioner's work relative to that of other researchers in the same specialty. However important research into, for instance, *Helicobacter pylori* may be, it does not follow that every competent scientist performing such research merits a waiver.

New witness letters accompany the RFE response. Professor [redacted] of Washington University School of Medicine describes the petitioner's work there:

> In my laboratory [the petitioner] (i) studied H. pylori drug resistance patterns and mechanisms; (ii) studied cooperation vs. competition between strains of H. pylori in a mouse mixed experimental infection model, with a goal of better understanding host factor effects on H. pylori fitness and forces that drive H. pylori genome evolution; (iii) carried out DNA transformation to generate derivative H. pylori strains with specific ribosomal DNA resistance mutations; and (iv) carried out PCR and DNA sequence analyses of housekeeping

> and virulence genes, with special interest in phylogenetic relationships of Iranian H. pylori strains to those of Europe and Eastern parts of Asia. Most of the specific methods for carrying out these experiments were new to him. He learned them very quickly and made important contributions to our research program.

Materials submitted in response to the RFE indicate that the petitioner left Washington University in April 2004, weeks after he filed the petition in March 2004, to become the supervisor of the Microbiology Department of the Warren Analytical Laboratory in Greeley, Colorado, a facility operated by the Institute for Environmental Health, Inc. (IEH), based in Seattle, Washington. The petitioner's own description of this new position contains no mention of work with *Helicobacter pylori*, the project that formed the original justification for the waiver request.

[redacted] Vice President of IEH, states: "The individual filling this position must be capable of conducting research to identify mechanisms of adaptive response in microbial pathogens with concern in food and environmental exposures," and must be able "to identify conditions of environmental stress adaptation that can be used for risk assessment and creation of patentable methods for intervention in food and environmental process." The petitioner does not qualify for a waiver simply by meeting the minimum requirements for a given position; the statute and regulations establish no blanket waiver in the petitioner's field of endeavor. Furthermore, we cannot ignore that the petitioner's initial filing made no mention of this position at all. If he was not eligible at the time of filing, the petition cannot subsequently become approvable based on a new job offer after the filing date. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

The director denied the petition on December 3, 2005, acknowledging the intrinsic merit and national scope of the petitioner's occupation, but finding that the "petitioner's research activities are not, by his own admission, where he made his major contributions," and that "no evidence was submitted to show the alien petitioner's accomplishments as a professor or teacher." The director found several of the petitioner's claims to be uncorroborated, and also noted that some of the dates on the petitioner's own *curriculum vitae* do not conform to the dates on the related evidence. For instance, a January 2003 letter indicates that the petitioner had spent the last three years at the Iranian Infectious Disease and Tropical Medicine Research Center (*i.e.*, since *circa* early 2000), whereas the petitioner claimed to have begun working there in 1998.

On appeal, counsel makes various factual claims without corroboration. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 2, 4 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel states that the director denied the petition "based on reasons such as some documents submitted by appellant were not translated or appellant's last name was translated wrong or that he learned new methods at the Washington University and because he learned those methods he was able to find employment in Colorado." With regard to these specific observations noted in the above quotation, it is a matter of policy

that if a foreign-language document is submitted without a translation, we are unable to consider the contents of that document. *See* 8 C.F.R. § 103.2(b)(3). Regarding the second point, if the petitioner submits published material that shows a different name, but claims this as his own work, it cannot suffice for counsel simply to assert that his "last name was translated wrong." With regard to the beneficiary's "employment in Colorado," the issue is not that the petitioner "learned new methods," so much as that he has already left the position at Washington University that was, originally, one of the grounds for the waiver claim.

More fundamentally, counsel's above statement is, at best, a mischaracterization of the director's decision. While the director did cite a number of irregularities in the record, these appear to be careless mistakes rather than any orchestrated or deliberate attempt at fraud or misrepresentation. The unifying factor in the decision is the absence of evidence of the petitioner's impact on his field. For instance, the director stated: "the alien petitioner submitted copies of articles and abstracts that he authored or co-authored. However, no evidence was submitted to show the impact that these publications have had in his field." The petitioner's choice of career or research specialty is not, by itself, grounds for a national interest waiver; the petitioner must distinguish himself, in a meaningful way, from others in his specialty. We do not dispute counsel's assertion that the petitioner "has successfully demonstrated that he is [a] qualified professor/researcher in Microbiology and Immunology," but being a qualified professor/researcher in those fields does not automatically or presumptively entitle him to a waiver. Professionals in those fields are typically subject to the statutory job offer requirement.

Counsel asserts that the petitioner "is already a leader in his [field]. He has been in the United States for over two years and he is holding a senior scientist position in his present occupation." As we have already noted, the petitioner's "present occupation" is at IEH, where he did not work until after he filed the petition. It cannot be argued that the director, at the time of filing, should have foreseen the petitioner's subsequent change of employers. The petitioner's promotion to "a senior scientist position," entailing his relocation from Greeley, Colorado to Seattle, Washington, is an even later development, never mentioned until counsel's appellate brief. We note that counsel adds: "Petitioner has been able to secure a position as a senior scientist within 2 years of his arrival in the United States. The mere fact that petitioner accomplished so much in so little time says a lot about his qualification and knowledge in the [field] of microbiology." We note that the petitioner's career did not begin with his entry into the United States in 2003. The petitioner, born in 1944, earned his master's degree in 1972 and has been active in his field for decades. The petitioner is clearly a qualified and experienced scientist, but his ability "to secure a position as a senior scientist" at the age of 60 does not, on its face, show that the petitioner has "accomplished so much in so little time."

Other than discussing the petitioner's employment at IEH, which is inapplicable to his eligibility as of the filing date, counsel offers no argument to support the conclusory statement that the petitioner "is already a leader in his [field]" whose "past record justifies projections of future benefits to the national interest." The director had observed that the record contains no objective evidence to show the extent of the petitioner's impact on his field. Counsel, on appeal, offers no rebuttal to this finding.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest

waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.